UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORENTZ MERISIER,	:	00 Civ. 0393 (GBD)(AJP)
Petitioner,	:	
-against-	:	
IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT,	:	**REPORT AND RECOMMENDATION**
Respondent.	:	

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable George B. Daniels, United States District Judge:

Petitioner Orentz Merisier, a Haitian national, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging a final administrative order of deportation ordered by the Board of Immigration Appeals ("BIA") on March 6, 1995. Merisier alleges that (1) the Immigration and Naturalization Service ("INS") abused its discretion when the BIA denied his appeal for

discretionary relief from deportation under 8 U.S.C. § 1182(c) (Immigration & Nationality Act §212(c)); and (2) he is entitled to withholding of removal under Article III of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027, 1028 ("Torture Convention"). For the reasons set forth below, Merisier's habeas petition should be DENIED.

FACTS

Background

In July 1986, Merisier came to the United States legally from Haiti at age 14 as a permanent resident alien. (See Return Ex. A: Certified Administrative Record (hereafter "R.") at 76: Immigration Judge ["IJ"] Oral Decision; R. 99: Deportation Hearing Tr.; R. 170: Immigrant Visa & Alien Registration.) In March 1993 he married an American citizen; they have two young children. (R. 103.) Starting in 1989, Merisier worked cleaning offices on Long Island. (R. 108-09.) He also worked for a while at the Roy Rogers

restaurant in the Massapequa Mall and, later, for his uncle, cleaning floors. (R. 109-10, 113-15.)

In late 1991, Merisier pled guilty to a felony of attempted criminal sale of a controlled substance stemming from a buy-and-bust sale for $40 worth of crack cocaine on September 23, 1991; Merisier was sentenced to six months in prison and five years' probation. (Pet. ¶ 1; R. 100, 121-22, 155, 166, 168.) While still on probation, Merisier was arrested in January 1993 for the armed robbery of a taxi driver. (R. 125-28, 148-49.) Merisier admitted to hitting the cab driver on the back of the head, taking a knife away from him,[1/] and handing the knife to an accomplice "who subsequently stabbed the cab driver a couple of times." (R. 148-49; accord, R. 126-28.) Merisier pled guilty to attempted robbery and, on April 8, 1993, was sentenced in Supreme Court, Suffolk County, to four-and-a-half to nine years imprisonment. (Pet. ¶ 2; R. 100-01, 145, 162.)

[1/] The knife was Merisier's; he had given it to his accomplice before getting into the cab, and the driver had taken it from Merisier's accomplice.

Since his crimes, Merisier has shown evidence of his purported remorse, including exhibits he presented to the BIA. (See 4-5, below.) In his habeas petition, he wrote:

> I WAS AND STILL DEEPLY AFFECTED WITH GRIEF AND SORROW FOR HAVING DONE WRONG TO THE PEOPLE VICTIM, AND THE SOCIETY OF UNITED STATE THAT GAVE ME AND MY ENTIRE FAMILY A SAFE HAVEN. I SHOWED TO BOTH IMMigration COURT and BOARD MY CONTRITION and REMORSE. . . . THE MOST important the record reflected my sincere desire to rehabilitate and steps I took toward rehabilitation. SINCE my crime was control substance I took drug and alcohol awareness courses. FOR my robbery conviction in the first degree I took counseling against violence. . . . I AM now genuinely rehabilitated and did assert that to both the IMMigration judge AND THE BOARD of IMMigration appeal.

(Pet. ¶¶ 7-10.) In addition, Merisier attached to his federal habeas petition several other documents which were not part of the administrative record, including the State Department's Country Report on Human Rights Practices for 1997 in Haiti, and two undated newspaper articles about Haiti's political situation.

Administrative Proceedings

Based on Merisier's convictions, the INS brought deportation proceedings by Order to Show Cause served on Merisier in April 1994. (See R. 180-86: Order to Show Cause.) The Order recited that Merisier was:

> subject to deportation pursuant to the following provision(s) of law:
>
> Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after entry, you have been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act, to wit: a crime of violence as defined in Section 16 of Title 18, United States Code, not including a purely political offence, for which a term of imprisonment imposed was five years or more. . . .
>
> Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (Act), as amended, in that, at any time after entry, you have been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country, relating to a Controlled Substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802). . . .

(R. 183, 185.) A deportation hearing, at which Merisier was represented by counsel, was held on October 26, 1994 at Downstate Correctional Facility in Fishkill, New York before Immigration Judge ("IJ") Howard I. Cohen. (See R. 97-134.) At that time, Merisier also applied for a waiver of deportation (see

R.110-13) under § 212(c) of the Immigration & Nationality Act ("INA") then in force, which provided for discretionary relief for deportable aliens resident in the United States for seven years or more. See 8 U.S.C. § 1182(c) (repealed 1996).[2/]

The IJ's oral decision reviewed the evidence, denied Merisier's application for discretionary relief under § 212(c), and ordered him deported to Haiti. (R. 76-84.)[3/] Merisier, acting pro se, appealed the IJ's decision to the Board of Immigration Appeals, on October 31, 1994. (R. 67: Notice of Appeal.) He claimed that he "was deprived of his fundamental Constitutional minimum procedure rights guaranteed at a[n] Immigration Deportation proceeding,"

[2/] Waiver of deportation under this provision is referred to as "Section 212(c) relief."

[3/] The IJ concluded:

> I find that based on his criminal record, wherein the Court put him on probation for five years in early 1992, and just a little over a year later, he gets involved in a very serious offense, that rehabilitation is an important factor. [Merisier] has shown no rehabilitation to speak of for which I could grant this relief. . . . [Merisier] has a wife and two children for whom he hasn't shown complete responsibility in the past, has a limited work history, has shown no social security records, no tax returns were submitted. I believe on this record that it would be in the best interest of the United States that this [§ 212(c)] relief [from deportation] not be granted.

(R. 83-34.)

and that the INS violated its own evidence rules at the hearing. (Id.; see also R. 42-45: Merisier BIA Notice of Appeal.) Attached to Merisier's BIA brief were exhibits showing his participation in nonviolence workshops (R. at 47-48), a prison substance abuse program (R. 50-52), and a basic education class (R. 54-55). He also included letters from his wife and a friend. (R. 57-60.)[4/]

The BIA declined to consider these additional exhibits because they were not presented at the deportation hearing. (See R. 37 n.3.) The BIA affirmed the deportation order on March 6, 1995, ruling that Merisier's "deportability has been established by clear, unequivocal, and convincing evidence, as required" by the Supreme Court and INS regulations. (R. 37.) The BIA also found that no evidence was erroneously admitted and that the Immigration Judge properly denied Merisier's application for a Section 212(c) waiver of removal. (R. 38-39.)

[4/] His wife, Tisha Merisier, wrote: "No matter what anyone has to say about my husband's misgivings, he has always been there for me." (R. 58.) The friend, Nellie Cook, reiterated this sentiment, saying that Merisier had improved while in prison, that his family needed him, and that she and her family were willing to continue to help the Merisiers if he were released: "We (my family) will . . . put a strong arm around him and keep him going in the right direction." (R. 59-60.)

Merisier did not file a petition for review of the BIA's decision in the Second Circuit. Shortly after the BIA's decision was rendered, however, Merisier wrote to the Justice Department's Executive Office for Immigration Review, seeking political asylum. (Pet. Ex.: June 5, 1995 Letter; accord, R. 4-5.) The letter was stamped received by the Justice Department on June 13, 1995, but there is no indication that the Department responded to it. (R. 4: June 5, 1995 Letter (stamped copy).)

Almost four years later, on May 7, 1999, Merisier moved to reopen his case (R. 27-28) pursuant to regulations promulgated in order to comply with the United States' obligations under the Torture Convention, which prohibits the return of an alien to a country where there exists substantial grounds for believing that he would be in danger of being subjected to torture. See 8 CFR 208.18(b)(2)(authorizing motion to reopen for deportation orders that became final as of March 22, 1999); Torture Convention Art. III. In that application, Merisier asserted that his father had worked for the prior Haitian government and "since he was forced out of office, my father has been

persecuted," and an uncle was assassinated. (R. 27.) Merisier claimed that his father "was involved with a secret police organization in Haiti that was known for the execution of mass violations of Human Rights against its citizens. It has come to [Merisier's] knowledge that some of the opposition forces are still in hiding in Haiti and has a genuine fear for his life upon his return to Haiti." (R. 28.) Merisier did not specify exactly what post his father had in the prior Haitian government, when or how his father was "persecuted," how the assassination of his uncle might indicate that Merisier himself would be in danger upon his return, or why he should fear for his life in Haiti. (See R. 27-28.) Merisier did not allege any past persecution or torture in Haiti against him personally.

On June 24, 1999, the BIA denied Merisier's motion to reopen, noting that it was "generally incoherent and internally inconsistent. His claim is insufficient to establish a prima facie claim under Article 3 of the Convention Against Torture." (R. 2.)

Merisier's § 2241 Habeas Petition

Merisier filed the instant § 2241 habeas petition with the Court's Pro Se Office in December 1999. (Dkt. No. 1: Pet. at p. 1.) His petition, read liberally as it must be, essentially challenges (1) the BIA's affirmation of the IJ's denial of Section 212 (c) relief from the final order of deportation lodged against Merisier (Pet. ¶¶ 1-12, 14-16), and (2) the BIA's denial of his motion to reopen based on his Torture Convention claim (Pet. ¶¶ 13, 9.B 1 - 9.B 3). The petition asserts new factual assertions concerning Merisier's claim under the Torture Convention:

> My FATHER served in military of DUVALIE[R] and he and all the family fled after the over throw of baby doc [Duvalier] government. My uncle[, Gerard Merisier], was burnt alive after being subject to gross torture. . . . As a young boy of age 14 years I had witness continue reprisal and retaliation against political opponent against their opponents family members. I remember and recall that I was threatened with death if I did not tell NEW GOV'T that had overthrown DUVALIE[R] WHERE MY FATHER WAS... HIDING. I was burnt with hot hair iron comb and still have the scar up to today. I was tortured to give information as to the alleged wrong my father did and his where abouts, and since I was not forthcoming I was threatened with death. I was release by the then government officials and told that I shall be contacted . . . in a week to get their information. THE TOP GOVERNMENT OFFICIALS said nothing to protect me then. THE ENTIRE FAMILY WAS NOT SAFE AND U.S. CONSULATE OFFICE ASSISTED US TO [obtain a] VISA TO MIGRATE TO U.S.

> AS OF TODAY THERE STill EXIST the retaliation against family members of torture DUVALIER MILITARY officials. MOBS has killed those that did return after the [A]merican invasion and so did the newly formed police.

(Pet. ¶¶ 9.B 1 - 9.B 3.)

On January 14, 2000, then Chief Judge Griesa, "[i]n order to preserve the Court's jurisdiction of the case," stayed Merisier's removal or deportation and ordered the government to respond to Merisier's petition. (Dkt. No. 2: 1/14/00 Order.)

ANALYSIS

Between the time Merisier's removal order became final in 1995 and the time he filed this habeas corpus petition, Congress drastically altered the ways individuals can challenge deportation orders. See generally Ncube v. INS District Directors & Agents, 98 Civ. 0282, 1998 WL 842349 at *4-11 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.) (describing 1996 changes to immigration laws). As explained below, one effect of those changes was to narrow judicial review of orders of removal. Review of Merisier's challenge to the INS' 1995

final order of removal against him is governed by the changes enacted in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); his challenge to the BIA's denial of his 1999 motion to reopen his case is governed by the permanent provisions constricting judicial review enacted in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). The AEDPA deprives this Court of jurisdiction to hear Merisier's attack on the INS' 1995 discretionary denial of § 212(c) relief. Furthermore, the INS' determination that Merisier's removal does not violate the Torture Convention is supported by substantial evidence. Merisier's petition should be denied in its entirety.

I. THE LAW GOVERNING JUDICIAL REVIEW OF INS DECISIONS: AN OVERVIEW

A. Pre-1996 Law

Prior to April 1996, aliens could obtain judicial review of a final order of the BIA by filing a statutory petition for review in the Courts of Appeals pursuant to INA § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996). See, e.g.,

Henderson v. INS, 157 F.3d 106, 117 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 s. Ct. 1141 (1999); Turkhan v. INS, 123 F.3d 487, 488 (7th Cir. 1997); Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 354-55 (E.D.N.Y. 2000); Ncube v. INS District Directors & Agents, 98 Civ. 0282, 1998 WL 842349 at *4 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.); Cholak v. United States, No. Civ. A. 98-365, 1998 WL 249222 at *2 (E.D. La. May 15, 1998); Jorge v. Hart, 97 Civ. 1119, 1997 WL 531309 at *2 (S.D.N.Y. Aug. 28, 1997); Mojica v. Reno, 970 F. Supp. 130, 158 (E.D.N.Y. 1997) (Weinstein, D.J.), aff'd in relevant part, Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). Additionally, INA § 106(a)(10) stated that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (repealed 1996); see, e.g., Jean-Baptiste v. Reno, 144 F.3d 212, 215 (2d Cir. 1998); Ncube v. INS, 1998 WL 842349 at *4; Jorge v. Hart, 1997 WL 531309 at *2; Mojica v. Reno, 970 F. Supp. at 158; Yesil v. Reno, 958 F. Supp. 828, 831 (S.D.N.Y. 1997), aff'd in relevant part, Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). Moreover, an alien whose deportation had not yet been executed after

the final order of deportation could challenge "any determination of the Attorney General concerning detention, release on bond, or other release" by way of a habeas corpus petition, although the scope of such judicial review was narrow. See 8 U.S.C. § 1252(c) (1994) (repealed 1996); see also, e.g., Doherty v. Thornburgh, 943 F.2d 204, 210 (2d Cir. 1991), cert. dismissed, 503 U.S. 901, 112 S. Ct. 1254 (1992); Dor v. District Director, INS, 891 F.2d 997, 1002-03 (2d Cir. 1989); Ncube v. INS, 1998 WL 842349 at *4; Thompson v. United States Dep't of Justice, 902 F. Supp. 489, 490-91 (S.D.N.Y. 1995); Prari v. INS, 855 F. Supp. 64, 65 (S.D.N.Y. 1994).

Finally, prior to 1996, although rarely used because of the immigration-specific habeas provisions, an alien could challenge a deportation order through the "general" habeas corpus statute, 28 U.S.C. § 2241. See, e.g., Henderson v. INS, 157 F.3d at 112-16, 118-22; Magana-Pizano v. INS, 152 F.3d 1213, 1216-17 (9th Cir.) ("Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods:

(1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241. Prior to its repeal by AEDPA, INA § 106(a) provided the primary means of habeas review because its scope was broader than 28 U.S.C. § 2241."), amended, 159 F.3d 1217, 1998 WL 787359 (9th Cir. Nov. 13, 1998); Ncube v. INS District Directors and Agents, 1998 WL 842349 at *5.[5/]

In short, prior to the 1996 Amendments, an alien had three means to obtain judicial review of an INS decision: statutory appeal to the Court of Appeals, INS statutory habeas and general § 2241 habeas. See, e.g., Ncube v. INS, 1998 WL 842349 at *5.

B. The 1996 Amendments

[5/] See also, e.g., Billett v. Reno, 2 F. Supp. 2d 368, 370 (W.D.N.Y. 1998); Jorge v. Hart, 1997 WL 531309 at *5 ("Between 1961 and 1996, the majority of circuits that addressed the issue held that district courts had habeas corpus jurisdiction over challenges to the validity of deportation orders pursuant to INA § 106(a)(10) and 28 U.S.C. § 2241 as to aliens in custody pursuant to deportation orders."); Cholak v. United States, 1998 WL 249222 at *2.

1. The AEDPA

In 1996, Congress drastically limited judicial review of removal orders against aliens previously convicted of certain crimes, including those to which Merisier pled guilty. The first of these changes, the Antiterrorism and Effective Death Penalty Act, was enacted on April 24, 1996. AEDPA § 401(e), entitled "Elimination of Custody Review by Habeas Corpus," and § 440(a), repealed 8 U.S.C. § 1105a(a)(10), and replaced it with a new paragraph (10), which read: "Any final order of deportation against an alien who is deportable by reason of having committed [an enumerated crime] shall not be subject to review by any court." See, e.g., Henderson v. INS, 157 F.3d 106, 117 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999); Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 354-55 (E.D.N.Y. 2000); Ncube v. INS District Directors & Agents, 98 Civ. 0282, 1998 WL 842349 at *5 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.); Yesil v. Reno, 958 F. Supp. 828, 831 (S.D.N.Y. 1997), aff'd in relevant part, Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).[6/]

[6/] Notwithstanding the AEDPA's broad language, federal courts retain some jurisdiction to (continued...)

2. IIRIRA

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which effected an even more dramatic change in the immigration laws. See, e.g., Henderson v. INS, 157 F.3d 106, 117 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999). IIRIRA provided two sets of rules relating to review of deportation orders, which are now called removal orders. See IIRIRA § 309. First, the "transitional rules," which are not codified in the United States Code, apply to aliens who were subject to deportation hearings prior to April 1, 1997 but who had not received a final order of deportation until after October 30, 1996. Id. The "permanent rules" apply to "all final orders of deportation or removal and motions to reopen" commenced on or after April 1, 1997, IIRIRA's effective date. IIRIRA §§ 306(c), 309; see

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[6/](...continued)

consider an alien's § 2241 habeas petition challenging deportation orders. See, e.g., Blake v. Ingham, No. 99-CV-0331, 1999 WL 1293353 at *2 (W.D.N.Y. Dec. 3, 1999); Pottinger v. Reno, 51 F. Supp. 2d 349, 356 (E.D.N.Y. 1999); Ncube v. INS, 1998 WL 842349 at *5 n.1 (citing cases); Thomas v. INS, 975 F. Supp. 840, 842 (E.D. La. 1997); Yesil v. Reno, 958 F. Supp. at 837-38; Duldulao v. Reno, 958 F. Supp. 476, 479-80 (D. Haw. 1997); Application of Castellanos, 955 F. Supp. 96, 97 (W.D. Wash. 1996); Eltayeb v. Ingham, 950 F. Supp. 95, 98-99 (S.D.N.Y. 1997); Powell v. Jennifer, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996); Dunkley v. Perryman, No. 96 C 3570, 1996 WL 464191 at *3 (N.D. Ill. Aug. 9, 1996); Mbiya v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996); see also Jean-Baptiste v. Reno, 144 F.3d 212, 218-20 (2d Cir. 1998) (habeas review survives IIRIRA).

also, e.g., Henderson v. INS, 157 F.3d at 117; Goncalves v. Reno, 144 F.3d 110, 116 (1st Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1140 (1999); Kalaw v. INS, 133 F.3d 1147, 1149-50 (9th Cir. 1997); Skutnik v. INS, 128 F.3d 512, 513 (7th Cir. 1997) (Easterbrook, C.J.); Ncube v. INS, 1998 WL 842349 at *5 n.2.

Since Merisier received his final INS deportation order in 1995, neither IIRIRA's transitional nor permanent rules apply in general to his challenge to the 1995 removal order. Edoo v. Kaplinger, 47 F. Supp. 2d 769, 770 (W.D. La. 1999). Rather, "[d]eportation orders that became final before October 30, 1996" -- such as the INS' 1995 deportation order as to Merisier -- "are not affected by the IIRIRA and are governed by the 1961 Immigration Act -- as amended, of course, by the AEDPA." Henderson v. INS, 157 F.3d at 117.[7/] The INS agrees that this is correct. (INS Br. at 4 n.1.) However, since Merisier's motion to reopen was not

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[7/] After the AEDPA was passed, but before IIRIRA's enactment, the Second Circuit determined that the AEDPA's jurisdictional scheme applied retroactively to strip the appeals courts of jurisdiction over cases pending before it when the Act was passed: "[S]ection 440(a) of the AEDPA may be applied to remove our pre-existing jurisdiction over petitions for review filed before the Act's effective date by those aliens" who have committed the enumerated offenses. Hincapie-Nieto v. INS, 92 F.3d 27, 29 (2d. Cir. 1996); accord, e.g., Henderson v. INS, 157 F.3d at 118, 122 (only § 2241 jurisdiction remedies available recognizing that majority of circuits apply AEDPA § 440(a) to pending cases, citing cases); LaFontant v. INS, 135 F.3d 158, 162, 164-65 (D.C. Cir. 1998); Mansour v. INS, 123 F.3d 423, 424-25 (6th Cir. 1997); Fernandez v. INS, 113 F.3d 1151, 1153-54 (10th Cir. 1997); Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 355 (E.D.N.Y. 2000).

filed until May 7, 1999, IIRIRA's permanent rules apply to his challenge to the INS' 1999 decision.

Like the AEDPA amendments, the permanent IIRIRA rules tightly restrict judicial review of the Attorney General's removal decisions. IIRIRA § 306(a) retained the requirement that judicial review of removal orders be initiated by a petition for review filed in the Court of Appeals. 8 U.S.C. § 1252(b)(2). However, an amendment contained in IIRIRA § 306(a)(2) perpetuated the AEDPA's jurisdictional bar prohibiting review "by any court" of an order of removal against a criminal alien who has been found removable for the commission of enumerated crimes. 8 U.S.C. § 1252(a)(2)(C); see Ncube v. INS, 1998 WL 842349 at *5. The language of current 8 U.S.C. § 1252(a)(2)(C) is not materially different from that in AEDPA § 440(a). Thus, the effect of this portion of IIRIRA was merely to relocate the jurisdiction-stripping language within the United States Code by repealing 8 U.S.C. § 1105a, see IIRIRA § 306(b), and enacting the new jurisdiction-stripping language, see IIRIRA § 306(a)(2), codified at 8 U.S.C. § 1252(a)(2)(C). See Henderson v.

INS, 157 F.3d at 117 n.7; Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 358 (E.D.N.Y. 2000); Ncube v. INS, 1998 WL 842349 at *5.

Additionally, the same IIRIRA amendment adds a new subsection (g) to 8 U.S.C. § 1252, entitled "Exclusive Jurisdiction":

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

IIRIRA § 306(a)(2), codified at 8 U.S.C. § 1252(g); see also, e.g., Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 477-78, 119 S. Ct. 936, 940-41 (1999); Ncube v. INS, 1998 WL 842349 at *5-6; Marriott v. Ingham, 990 F. Supp. 209, 211 (S.D.N.Y. 1998). Unlike the other "permanent rules," this provision applies retroactively to Merisier's challenge to the 1995 order. IIRIRA § 306(c) (applying the "Exclusive Jurisdiction" subsection "without limitation to claims arising from all past, pending or future exclusion, deportation, or removal proceedings"); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. at 477-78, 119 S. Ct. at 940-41; Edoo v.

Kaplinger, 47 F. Supp. 2d at 770; Marriott v. Ingham, 990 F. Supp. at 211. However, the Supreme Court has held that this provision applies only narrowly to the "three discrete actions" that the Attorney General may take (her decision to commence proceedings, adjudicate cases or execute removal orders), not to "all claims arising from deportation proceedings." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. at 482, 119 S. Ct. at 943. The Court explained that these decisions are discretionary; the point of subsection (g) was to shield the Attorney General's discretion from judicial scrutiny, even for pending cases, in order to avoid "deconstruction, fragmentation, and hence prolongation of removal proceedings." Id. at 485-87, 119 S. Ct. at 944-45.

Finally, IIRIRA's permanent rules make explicit this protection of discretionary decisionmaking. IIRIRA § 306(a)(2) strips the courts of "jurisdiction to review . . . any . . . decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." IIRIRA § 306(a)(2), codified at 8 U.S.C.

§1252(a)(2)(B); see INS v. Yang, 519 U.S. 26, 29 n.6, 117 S. Ct. 350, 352 n.1 (1996); Zheng v. McElroy, 98 Civ. 1772, 1998 WL 702318 at *4-5 (S.D.N.Y. Oct. 7, 1998); Marriott v. Ingham, 990 F. Supp. at 211; Jorge v. Hart, 97 Civ. 1119, 1997 WL 531309 at *3 (S.D.N.Y. Aug. 28, 1997).

II. THIS COURT LACKS JURISDICTION TO HEAR MERISIER'S CHALLENGE TO THE INS' 1995 DENIAL OF § 212(C) RELIEF

Despite the jurisdiction stripping language and other restrictions on judicial review of INS decisions in the AEDPA and IIRIRA, "the Second Circuit and a majority of other courts that have considered the issue have held that habeas corpus review of immigration decisions remains available under the general federal habeas statute, 28 USC § 2241." Ncube v. INS District Directors & Agents, 98 Civ. 0282, 1998 WL 842349 at *7 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.) (citing cases including, inter alia, Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999); Jean-Baptiste v. Reno, 144 F.3d 212, 220 (2d Cir. 1998) ("In sum, we join other courts in holding that § 2241 habeas review survives the amendments

to the INA enacted by" IIRIRA)); see also, e.g., Arias-Agramonte v. Commissioner of INS, 00 Civ. 2412, 2000 WL 1059678 at *10-13 (S.D.N.Y. Aug. 1, 2000) (IIRIRA did not repeal habeas jurisdiction over questions of statutory interpretation); Santos-Gonzalez v. Reno, 93 F. Supp. 2d 286, 290 (E.D.N.Y. 2000); Maria v. McElroy, 68 F. Supp. 2d 206, 215-16 (E.D.N.Y. 1999).

In Henderson, the Second Circuit concluded:

> Accordingly, we hold that the federal courts have jurisdiction under § 2241 to grant writs of habeas corpus to aliens when those aliens are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241. This is not to say that every statutory claim that an alien might raise is cognizable on habeas. But those affecting the substantial rights of aliens of the sort that the courts have secularly enforced -- in the face of statutes seeking to limit judicial jurisdiction to the fullest extent constitutionally possible -- surely are.

Henderson v. INS, 157 F.3d at 122 (emphasis added); see also, e.g., Goncalves v. Reno, 144 F.3d 110, 133 (1st Cir. 1998) ("The scope of [§ 2241] habeas jurisdiction is not limited to constitutional claims, but encompasses at least the pure issues of law concerning the applicability of statutory provisions" by the Attorney General to aliens), cert. denied, 526 U.S. 1004, 119 S. Ct. 1140 (1999); Magana-Pizano v. INS, 152 F.3d 1213, 1221-22 (9th Cir.), amended, 159

F.3d 1217, 1998 WL 787359 (9th Cir. Nov. 13, 1998) (rejects "miscarriage of justice" limitation); Ncube v. INS, 1998 WL 842349 at *10; Lee v. Reno, 15 F. Supp. 2d 26, 42-43 (D.D.C. 1998) (rejects "miscarriage of justice" standard; § 2241 extends to all constitutional claims and to issues of statutory construction); Mojica v. Reno, 970 F. Supp. 130, 163 (E.D.N.Y. 1997) (Weinstein, D.J.), aff'd in relevant part, Henderson v. INS, 157 F.3d 106 (2d Cir. 1998); Hermanowski v. Farquharson, No. Civ. A. 97-220, 1998 WL 388415 at *5 (D.R.I. June 1, 1998) (§ 2241 petition available for challenge to INS detention pending removal, where INS has been unable to remove alien to any other country). Very recently, the Second Circuit held that the jurisdiction stripping language of IIRIRA's permanent rules had the same effect as the transitional rules discussed in Ncube and Henderson – direct review in the Court of Appeals is foreclosed but § 2241 habeas corpus review of purely legal claims remains. Calcano-Martinez v. INS, Nos. 98-4033, 98-4214, 98-4246 (2d Cir. Sept. 1, 2000).

The Second Circuit pointed out that the issues before it in Henderson, for which it ultimately found § 2241 habeas jurisdiction was valid, were questions of "pure law." Henderson v. INS, 157 F.3d at 120 n.10. The panel was not "called upon . . . to review the agency's factual findings or the Attorney General's exercise of her discretion." Id. (citing Goncalves v. Reno, 144 F.3d at 125 (distinguishing between eligibility for discretionary relief – a legal question – and the "discretionary component of the administrative decision whether to grant relief")). "[W]hatever the outer perimeters of [§ 2241] review may be," the panel concluded, "the courts have the power to address the pure questions of law presented." Henderson v. INS, 157 F.3d at 112; accord, e.g., St. Cyr v. INS, No. 99-2614, 2000 WL 1234850 (2d Cir. Sept. 1, 2000); Ncube v. INS, 1998 WL 842349 at *10.

In this case, however, Merisier asks the court to rule on precisely what the Second Circuit avoided in Henderson: whether the Attorney General abused her discretion by denying him a waiver of deportation under INA § 212(c). See Ncube v. INS, 1998 WL 842349 at *10 ("The only issue Henderson

left open in the Second Circuit is the scope of § 2241 review of the INS's factual findings or of 'the Attorney General's exercise of her discretion.'").

In Ncube v. INS, this Court held that IIRIRA prevents the Court from reviewing the Attorney General's exercise of her discretion under § 2241. Ncube v. INS, 1998 WL 842349 at *10-11. The Court believes that conclusion and analysis also is applicable here to the AEDPA's removal of judicial review of the denial of discretionary relief to criminal aliens. This Court explained in Ncube:

> As stated by the Seventh Circuit, "the Supreme Court long ago made it clear that this writ [of habeas corpus] does not offer what [the] petitioner[] desire[s]: review of discretionary decisions by the political branches of government." Yang v. INS, 109 F.3d 1185, 1195 (7th Cir.) (Easterbrook, C.J.), cert. denied, [522 U.S. 1027,] 118 S. Ct. 624 (1997). Although § 2241 may be slightly more expansive than the "writ that Art. I § 9 cl. 2 preserves against suspension" discussed in Yang, see Yang v. INS, 109 F.3d at 1195, the Court believes that § 2241's scope does not include [petitioner's] discretionary claims. "[O]ne should not confuse claims of error . . . with claims that the Attorney General refused to acknowledge the existence of a discretionary power . . . " Yang v. INS, 109 F.3d at 1195. The Court finds that the only way to give proper effect to IIRIRA is to hold that discretionary claims are barred from judicial review because "[t]hat is the point of the legislation. Congress wanted to expedite the removal of [certain] aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to

> start the review process in the district court rather than the court of appeals." Id.
>
> Moreover, the language of § 2241 supports this finding. As discussed above, § 2241 allows a court to grant a petition only when an individual is in custody in violation of "the Constitution or laws or treaties of the United States." This language, by its terms, would only allow review in the situation where the abuse of discretion rises to a level of a constitutional violation or where the INS has misinterpreted its discretionary authority under the INA. See, e.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267-68, 74 S. Ct. 499, 503-04 (1954) ("It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised.... Rather, we object to the Board's alleged failure to exercise its own discretion contrary to existing valid regulations."). Put another way, "'[d]eportation without a fair hearing on charges unsupported' by any evidence is a denial of due process which may be corrected on habeas corpus. But a want of due process is not established by showing merely that the decision is erroneous." Yang v. INS, 109 F.3d at 1195 (quoting United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106, 47 S. Ct. 302, 304 (1927)).

Ncube v. INS, 1998 WL 842349 at *11 (emphasis added); see cases cited in Ncube; see also, e.g., Finlay v. INS, 210 F.3d 556, 557 (5th Cir. 2000); Liang v. INS, 206 F.3d 308, 321, 323 (3d Cir. 2000) (under AEDPA and IIRIRA, court lacks § 2241 jurisdiction to hear criminal alien's challenge to INS exercise of discretion not to waive deportation); Van Dinh v. Reno, 197 F.3d 427, 434-35

(10th Cir. 1999) (no jurisdiction to use a Bivens suit to review INS discretionary action); Bowrin v. INS, 194 F.3d 483, 490 (4th Cir. 1999) (under AEDPA and IIRIRA, "[o]nly questions of pure law will be considered on § 2241 habeas review. Review of factual or discretionary issues is prohibited.").[8/]

In this case, Merisier attacks only the BIA's 1995 denial of discretionary relief -- he does not question that the BIA's March 6, 1995 order of deportation was otherwise valid. He raises no collateral grounds, no constitutional insufficiency, and no error of law. Rather, he asks the Court to step in and second guess the Attorney General on a discretionary decision

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[8/] Several district courts outside this circuit also have declined jurisdiction when asked to review discretionary orders of the Attorney General. See Chavez v. INS, 55 F. Supp. 2d 555, 557 (W.D. La. 1999) (finding no § 2241 jurisdiction under IIRIRA to review INS denials of, inter alia, "application for relief from deportation"); Mendonca v. INS, 52 F. Supp. 2d 155, 162-63 (D. Mass. 1999) ("No court thus far has extended" the residual § 2241 jurisdiction to a discretionary decision not to adjust an immigrant's status. "Given the sweeping language of IIRIRA's judicial review provisions and the conviction of many courts that Congress intended the new immigration laws to narrow significantly the scope of federal courts' review of INS deportation decisions . . . I decline to do so here."); Edoo v. Kaplinger, 47 F. Supp. 2d 769, 773 (W.D. La. 1999) ("our § 2241 habeas jurisdiction, limited by IIRIRA, does not include jurisdiction to review discretionary decisions of the Attorney General. [Petitioner's] challenge to the Attorney General's denial of his request for cancellation of removal is, therefore, dismissed with prejudice for lack of subject matter jurisdiction."); Naidoo v. INS, 39 F. Supp. 2d 755, 772 (W.D. La. 1999) ("the relief petitioner seeks, review of a final order of deportation resulting from the denial of discretionary relief, is not within the scope of review available under the Suspension Clause.").

made more than five years ago. Under 28 U.S.C. § 2241 and AEDPA § 440(a), which applies to this pre-1996 deportation order and denial of discretionary relief, this Court lacks subject matter jurisdiction to review the INS' decision to deny Merisier discretionary relief. See, e.g., St. Cyr v. I.N.S., 2000 WL 1234850 (questions of pure law, as distinguished from "the BIA's refusal to exercise discretion in [petitioner's] favor," are cognizable on habeas review of a final order of removal); Sol v. INS, 97 Civ. 5994, 2000 WL 1154048 at *1 (S.D.N.Y. Aug. 15, 2000) (habeas court lacks jurisdiction to review denial of discretionary § 212(c) relief).[9/]

[9/] Even if the Court had the power to review the Attorney General's 1995 decision denying relief from removal, the Court would not find it to be an abuse of discretion. See, e.g., Sol v. INS, 2000 WL 1154048 at *2.

III. THE INS' DETERMINATION OF MERISIER'S CLAIM UNDER THE TORTURE CONVENTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The UN Torture Convention

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the Senate on October 21, 1994, was deposited with the United Nations by President Clinton that same day, and by its terms became effective one month later, on November 20, 1994. See 34 I.L.M. 590, 591 (1995); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 1999 WL 75823 (1999) (Background). Article III of the Convention provides:

> 1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Torture Convention, Art. III, 23 I.L.M. 1027, 1028 (1984).

On October 21, 1988, Congress passed implementing legislation. See Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-82 (1998). In that law, Congress stated that it is "the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Id. at § 2242 (a), codified as Note to 8 U.S.C. § 1231. In addition, Congress directed the Attorney General to develop regulations to implement the United States' treaty obligations under the Torture Convention. Id. at § 2242(b), codified as Note to 8 U.S.C. § 1231. Congress further provided that:

> (d) REVIEW AND CONSTRUCTION. -- Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

Id. § 2242(d), codified as Note to 8 U.S.C. § 1231.

On February 19, 1999, the INS promulgated regulations that, among other things, provide aliens an opportunity to reopen their final orders of deportation. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999), codified at 8 C.F.R. §§ 208.16 - 208.18 (2000). The regulations provide, in pertinent part, that "[a]n alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under [8 C.F.R.] § 208.16(c)." 8 C.F.R. § 208.18(b)(2). In order to reopen the proceedings, the applicant had to file by June 21, 1999 (as Merisier did) and make out a prima facie case that he is eligible for Torture Convention protection from removal. 8 C.F.R. §§ 208.18(b)(2)(i)-(ii). Then, to be eligible for withholding of removal, the regulations place the burden of proof on the applicant to show that it was "more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). In assessing whether it is more likely than not that an applicant would be tortured in the country of removal, evidence to be

considered includes: "Evidence of past torture inflicted upon the applicant" and "Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable," as well as "Other relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3)(i)-(iv).

B. Merisier's Torture Convention Claim

Merisier alleges that returning him to Haiti would place him in danger of being subjected to torture, thereby violating Article III of the Torture Convention. (Pet. ¶¶ 9-B 1, 9-C 1.) The BIA, however, found that Merisier's claim under the Torture Convention was "generally incoherent and internally inconsistent," and therefore denied his motion to reopen. (R. 2.) The INS argues here that the BIA's refusal to reopen Merisier's case based on his inartful submissions was purely discretionary and beyond the scope of habeas review available under 28 U.S.C. § 2241. (INS Br. 24-25.)

The Government here has conceded that § 2241 habeas review, as limited by IIRIRA and the case law under IIRIRA, is available to review Merisier's Torture Convention-based claim. (INS Br. at 24.) Because

Merisier's claim arises under the Torture Convention implementing legislation, see Note to 8 U.S.C. § 1231, the Court need not decide whether the Torture Convention otherwise is "self-executing," i.e., whether it creates any judicially enforceable rights apart from those stated in the "policy" enacted in Pub. L. No. 105-277.[10/] See Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1011-1013 & n.6 (9th Cir. 2000) (holding that Pub. L. No. 105-277, "imposes a clear and non-discretionary duty: the agencies responsible for carrying out expulsion, extradition and other involuntary returns must ensure that those subject to their actions may not be returned if they are likely to face torture" and therefore Torture Convention claims are subject to judicial review; no need to reach the question of whether or not the treaty is self-executing); see also, Miguel v. Reno, No. Civ. A. 00-3291, 2000 WL 1209375 at *2 (E.D. Pa. Aug. 25, 2000) (rejecting Torture Convention claim on § 2241

[10/] Compare Sandhu v. Burke, 97 Civ. 4608, 2000 WL 191707 at *9-10 (S.D.N.Y. Feb. 10, 2000) (holding that the Torture Convention is not self-executing and thus individuals lack standing to invoke it as a basis for habeas relief from an extradition order); Barapind v. Reno, 72 F. Supp. 2d 1132, 1149 (E.D. Cal. 1999); Calderon v. Reno, 39 F. Supp. 2d 943, 956-57 (N.D. Ill. 1998); cf. Diakite v. INS, 179 F.3d 553 (7th Cir. 1999) (holding that the circuit courts lack jurisdiction to review BIA's denial of a criminal alien's Torture Convention claim); see generally William M. Cohen, Implementing the U.N. Torture Convention in U.S. Extradition Cases, 26 Denv. J. Int'l L. & Policy 517, 523-24 (1998) (arguing that § 2241 habeas corpus jurisdiction is available to review extradition orders for compliance with Article III of the Torture Convention); Kristen B. Rosati, The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents The Removal of Persons Ineligible for Asylum and Withholding of Removal, 26 Denv. J. Int'l L. & Policy 533, 535-36, 575 & n.178 (1998) (concluding that the Convention Against Torture is self-executing but that in any event, as a treaty, "the U.S. must comply with it").

habeas review because alien had proffered insufficient evidence that he would be tortured if returned).

The Court, however, must determine the correct standard for such § 2241 habeas review of Torture Convention related claims. Because Merisier's motion to reopen under the Torture Convention was filed on May 7, 1999 and denied by the INS on June 24, 1999, both after passage of IIRIRA, it is clear that IIRIRA's jurisdiction-stripping amendments apply. (See p. 13, above.)

Under Henderson and Calcano-Martinez, after IIRIRA, the federal courts retain § 2241 jurisdiction to review legal questions raised by deportation orders. Calcano-Martinez v. INS, Dkt. Nos. 98-4033, 98-4214, 98-4246, slip op. (2d Cir. Sept. 1, 2000); Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999). Thus, this Court has jurisdiction under 28 U.S.C. § 2241 to review Merisier's Torture Convention claim insofar as he alleges that as a matter of law his return to Haiti would violate the treaty. Cf. Mali v. Keeper of the Common Jail of Hudson County,

New Jersey (Wildenhus' Case), 120 U.S. 1, 17, 7 S. Ct. 385, 390 (1887) (treaty rights may be enforced via a writ of habeas corpus).

Merisier points to no shortcomings in the procedure the INS has adopted to implement the Torture Convention. Rather, he disagrees with the INS' factual finding that he had not presented sufficient evidence to support his claim that he would be tortured if removed to Haiti. While the exact scope of § 2241 habeas review of INS factual determinations after IIRIRA is not yet well defined, e.g., Goncalves v. Reno, 144 F.3d 110, 125 (1st Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1140, the standard of such review must be at least as deferential as it was before the 1996 amendments, when courts applied the substantial evidence test to asylum applications, according "'substantial deference' to the BIA's findings of fact." Purveegiin v. United States INS Processing Ctr., 73 F. Supp. 2d 411, 417 (S.D.N.Y. 1999) (citing Melendez v. Department of Justice, 926 F.2d 211, 216-18 (2d Cir. 1991)); accord, e.g., Melgar de Torres v. Reno, 191 F.3d 307, 312-13 (2d Cir. 1999); Abankwah v.

INS, 185 F.3d 18, 22 (2d Cir. 1999). As Judge Scheindlin recently explained in a post-IIRIRA case brought under 28 U.S.C. § 2241:

> Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." As such, the Court's scope of review is "exceedingly narrow."

Purveegin v. United States INS Processing Ctr., 73 F. Supp. 2d at 417-18 (citation omitted).

The INS' determination that there do not exist substantial grounds for believing that Merisier would be tortured upon return to Haiti is supported by substantial evidence. Merisier twice was afforded the opportunity to articulate the basis for his fear of torture in Haiti -- once at the deportation hearing, represented by counsel, and a second time in his application to reopen the proceedings. Each time, he failed to suggest a coherent theory of who might want to torture him or why.[11/] See Miguel v. Reno, 2000 WL

[11/] As the INS brief explains:

> First, as the BIA properly observed, the motion was both incoherent and inconsistent. (A 2). In his motion, Merisier asserted that his father had worked for the Haitian government, and had been "forced out of office." (A 27) . . . . Merisier (continued...)

1209375 at *3 (mere participation in Haiti's former regime, as a secret policeman, not sufficient to show petitioner would be tortured upon his return). Haiti's violent past, and even Merisier's relatives' alleged participation in it, is not, without more, substantial grounds for believing that removing Merisier to Haiti would likely result in his being tortured. See Thavarajah v. District Director, INS, No. 99-4120, 210 F.3d 355 (table), 2000 WL 427378 at *3-4 (2d Cir. April 19, 2000). Moreover, Merisier's allegations

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[11/](...continued)

> did not . . . explain why his father was removed from "office." Moreover, Merisier stated that he would be executed by the Haitian government (A 27) -- but also contended that he had reason to fear because "some of the opposition forces are still in hiding in Haiti" (A 28). It is entirely unclear who these "opposition forces" are, and whether they are allies or enemies of the government in which Merisier's father had worked. It is also unclear how it has "come to [Merisier's] knowledge" that the "opposition forces" are still in hiding. (Id.)
>
> In addition, as the BIA correctly observed, Merisier's motion failed to establish a prima facie claim under the Torture Convention. (A 2.) Indeed, although Merisier claimed that his father has reason to fear danger in Haiti, he made no allegation supporting his contention that he himself has reason to fear danger in Haiti. Merisier did not allege that the current Haitian government (1) would connect Merisier to his father; (2) would impute any alleged wrongdoing by his father to Merisier; or (3) would hold Merisier responsible for his father's alleged actions some fifteen years after his father left the country. Moreover, although Merisier claimed that his uncle was assassinated in Haiti (A 27), he did not explain who killed him, when he was killed, for what reason he was killed, or whether his death was in any way connected to Merisier or Merisier's father.

(INS Br. at 25-26 & n.10.)

raised for the first time in this habeas petition cannot be considered because they were not raised before the INS. See 8 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 104.07[2] (Matthew Bender April 2000) (judicial review of immigration orders is generally limited to the existing administrative record); accord, e.g., Fedin Bros. Co. v. Sava, 724 F. Supp. 1103, 1105 (E.D.N.Y. 1989).

With no suggestion that the INS made an error of law or came to an unsupportable factual conclusion, this Court may not upset the INS' conclusions. Merisier's petition for a writ of habeas corpus should be denied. See David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 Yale J. Int'l L. 129, 197-99, 208-10 (1999) (summarizing caselaw interpreting the Torture Convention and concluding that, in light of legislative history, courts should "exercise appropriate restraint" when an alternative forum is available to adjudicate Torture Convention rights).[12/]

[12/] Merisier has, in addition, moved to amend his pleadings to join the State of New York as a respondent in order to attack the underlying state conviction upon which his final order of deportation is based. (See Merisier 8/22/00 Letter Motion.) The motion is denied because the new claim against the State would be futile. The state habeas claim is barred by the AEDPA period of limitation, 28 U.S.C. § 2244(d)(1), which requires that a claim be (continued...)

CONCLUSION

For the reasons set forth above, Merisier's petition for a writ of habeas corpus should be DENIED and the stay of removal previously entered by the Court should be lifted.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of

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12/(...continued)
brought within one year after the conviction became final or the factual predicate for the conviction arose. The latest conceivable date Merisier might propose to begin the running of the statute of limitations is June 24, 1999, when the Board of Immigration Appeals denied his motion to reopen. (See p. 7 above.) This is well over a year prior to his motion in this Court, which was dated August 22, 2000. (Merisier 8/22/00 Letter Motion.) The claim therefore would be time barred and his motion to amend the pleadings therefore should be DENIED. The Court also notes that even if the state habeas claim were not time-barred, it is not exhausted (because Merisier never appealed his state conviction) and therefore could not be heard on the merits in this Court unless it were denied. 28 U.S.C. §§ 2254(b)(1)-(2).

the Court, with courtesy copies delivered to the chambers of the Honorable George B. Daniels, 40 Centre Street, Room 410, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Daniels. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair

Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
September 12, 2000

Respectfully submitted,

Andrew J. Peck
United States Magistrate Judge

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